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Supreme Court of the United States

No. 451 October Term, 1936.

WILLIAM WHITLOCK BRUSH,

Petitioner,

against

COMMISSIONER OF INTERAL REVENUE.

MOTION FOR LEAVE TO FILE, AND MEMORANDUM IN SUPPORT OF PETITION FOR CERTIORARI, AMICUS CURIAE, BY STATE OF NEW YORK.

JOHN J. BENNETT, JR.,
Attorney General.

HENRY EPSTEIN,
Solicitor General,

For State of New York,
Capitol,
Albany, N. Y.

BATAVIA TIMES, LAW PRINTERS,
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WILLIAM WHITLOCK BRUSH,

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COMMISSIONER OF INTERNAL REVENUE.

Motion for Leave to File Memorandum.

To the Honorable the Supreme Court of the United States:

Now comes the undersigned, the State of New York, by its Attorney General John J. Bennett, Jr., through Henry Epstein, Solicitor General, as counsel, and prays leave to file the subjoined memorandum in support of the petition for writ of certiorari herein to the Circuit Court of Appeals, Second Circuit.

1. The problem presented is of paramount concern to the State of New York, as a sovereign State, and to its municipal and political subdivisions. The very essential character of certain governmental functions that have been considered of the essence of sovereign government is being challenged in this proceeding. The supply of wholesome potable water to the people of the State has for generations been accepted by the State and its subdivisions as a truly classic, usual and essential function of government. In very few, a negligible percentage, of the thousands of political subdivisions of the State, is this a private, or semi-public function. In the City of New York, with more than 55 per cent of the State's population, it has been a municipal function for over 100 years.

2. The State government itself has many cognate and like functions that may come within the scope of taxable category if the decision of the Circuit Court of Appeals, Second Circuit, be permitted to stand. The Water Power and Control Commission of the State, operating under the Conservation Law of New York; the Division of Canals and Waterways of the Department of Public Works; the various State Parks, Parkways, Park Commissions; The Reforestation Division of the Conservation Department; The Departments of Health and Mental Hygiene, in so far as operation of sanitariums, hospitals, asylums, etc. are involved, all would come within the scope of the broad decree of the Court from which appeal is sought.

3. In the various cities and political subdivisions such activities as the disposal of sewage, ashes and garbage, street cleaning, playgrounds, public hospitals, health and sanitation clinics and the like would come within the taxing scope of the Federal government if the decision of the Circuit Court of Appeals is to be followed, and as contended by the Bureau of Internal Revenue of the United States.

4. These were at one time private functions and were only assumed by the governments of State and municipal corporations and other political subdivisions as they became essential to the public welfare and a necessary phase of governmental activity. For generations now they have been regarded as essential governmental functions.

5. The key to the reasoning of the Circuit Court of Appeals is found in the following excerpt from the opinion:

> "That which is a proprietary function of a state government when undertaken, and so not immune from federal taxation, does not change its character because of its continuous exercise."

The Court failed completely to appreciate that it was not continuous use but the character of the function, continued in use, which gave it its essential or usual governmental nature.

6. The grave implications of this decision in the mutual cordial relationship of the States with the Federal government can readily be observed, when one considers that the Postal Service, Federal Reserve Banking System and other activities of the Federal government were private and not governmental when first assumed. Can it be said they are not essential or "usual" governmental functions? The water supply of New York City, in its governmental character, antedates the Constitution itself.

WHEREFORE, the State of New York prays that this Honorable Court will grant the petition herein and issue its writ of certiorari to the Circuit Court of Appeals, Second Circuit, as prayed for, and will accept on behalf of the undersigned, for consideration, the following supporting memorandum.

STATE OF NEW YORK,
By:
JOHN J. BENNETT, JR.,
Attorney General.

HENRY EPSTEIN,
Solicitor General,
Counsel.
September 22, 1936.

MEMORANDUM IN SUPPORT OF PETITION FOR CERTIORARI.

Facts.

Petitioner was the Chief Engineer of the Bureau of Water Supply of New York City, a civil service employee, at full time, and had been in the Department of Water Supply for over twenty years. The Board was created by statute (ch. 724 L. 1905), appointed by the Mayor, and is represented by the Corporation Counsel. It is one of the regular departments of the City government. (Charter of the City of New York, §468).

The Department of Water Supply, of which petitioner was an employee, has charge of all water supply structures and functions, including fire protection, pure and wholesome drinking water, protection from contamination, etc. The City itself uses something over 25% of the water supply. (R. 21.) Petitioner's services cannot be segregated in any such manner.

The cost of this water supply system is a sum approximating $500,000,000 (R. 23) and the projected construction of a new source of supply found to be essential to its inhabitants, will cost the city another quarter billion dollars.* In a decision of this Honorable Court it has been held:

> "Some place must be found and soon acted upon, and taking into account the superior quality of the water and other advantages of the proposed site over others, it at least is not arbitrary or beyond the freedom of choice that must be left to New York."

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* Message of Governor Lehman to Legislature Feb. 20, 1936.

New Jersey v. New York, 283 N. Y. 336 (1931). In that case the Special Master had found as a fact that "there is a real need for New York City taking immediate steps to increase its water supply." (p. 201—Master's Report.)

Public wells, giving free water to the residents of New York City date back to 1658 and 1686.** The municipal water supply has been a public function ever since. Today in the United States over 80 per cent of the 969 water systems are municipally owned. In New York State the percentage is even greater. (Municipal Atlas and Index, 1934-1935.) Can it be said that to a city of over seven millions of persons, the supply of water is not an essential function of government? Is it less than usual, historic or otherwise when it has been such for more than a century?

Even if we do, as suggested by government counsel in his brief below, "turn to things at the time the Constitution was framed," we have the function so accepted by New York City. Shall such State and municipal functions be subject to Federal taxation?

I.

The water supply of New York City represents a governmental function meeting the tests laid down by this Honorable Court.

Helvering v. Powers, 293 U. S. 214,
Indian Motorcycle Co. v. U. S., 283 U. S. 570,
Trenton v. New Jersey, 262 U. S. 182.

It has been established that the water supply to New York City is an absolute necessity. Must

** New Amsterdam Records—Vol. 7, p. 190.
Common Council of New York—Vol. I, p. 46.

sovereignty surrender and entrust the lives, health and welfare of its residents to the chance of private investment?

More than 25 per cent of the Water Supply Department's expenses are allocated to fire protection, street cleaning, public buildings, sewage and the like.

Reality and not academic discussion determine the exempt quality of municipal functions.

> "Just what instrumentalities of either a state or the Federal Government are exempt from taxation by the other cannot be stated in terms of universal application."
>
> *Metcalf & Eddy v. Mitchell,* 269 U. S. 514, 522.
>
> Also—*Levij Leasing Co. v. Siegel,* 258 U. S. 242.

II.

Taxation by the Federal Government of New York City's water supply, its revenues, or its employees, will burden the City and State directly.

The year 1932 showed a deficit of over $4,000,000. and 1933 of over $7,000,000. (Fol. 98 Record.) Municipal indebtedness results from the function. The taxpayers of the City and State bear the burden.

The limits are not defined, nor the necessary consequences of this extension of the Federal taxing power.

In *Comm'r of Internal Revenue v. Lamb,* (82 Fed. 2d—733) the government sought to tax the salary of

the Secretary of the Board of Park Commissioners of San Francisco. The Circuit Court of Appeals, 9th Circuit, held it an essential function of government and followed *Kellar v. Los Angeles,* 179 Cal. 605.

The same result was reached by the First Circuit, in *Comm'r vs. Sherman,* 69 Fed. (2d), 255—759. Neither of these cases was taken to this Court by the government. Can it be said that such a tax is a burden, but not one on water supply?

The application of the principles of *U. S. v. California,* (80 L. Ed. 367, Feb. 3, 1936), *Helvering v. Powers,* (293 U. S. 214), and *Columbus v. Mercantile Trust Co.,* (218 U. S. 645, 658), to the facts herein forces the conclusion that the determination below is unsound.

III.

Wherefore, your Amicus, the State of New York, prays that the petition herein for certiorari be granted.

Yours, etc.,

JOHN J. BENNETT, JR.,
Attorney General, New York State,

HENRY EPSTEIN,
Solicitor General,
Counsel.